Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The
Supreme Court Of The United States
October Term, 1996

TERESA MARIE PANTANI and
EDMUND L. PANTANI
Petitioners

v.

SHIRLEY D. PETERSON, Commissioner of the IRS
and UNITED STATES OF AMERICA
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Conflicting Federal Circuit Court, District Court and Tax Court decisions exist as to the recurrent question of whether an advance payment from a U.S. taxpayer with an extension of time to file request without the filing of a return is a payment of taxes as a matter of law subject to the applicable statute of limitations or whether it is a deposit to be held for the taxpayers' account until an appropriate return is filed or assessed.

A corollary issue is whether or not the characterization of said remittance as a payment or deposit should involve additional guideline factors requiring a hearing on the individual facts and circumstances of each taxpayer on this recurring question.

The parties seek a decisive ruling setting forth uniform taxpayers' rights across the nation in conformance with conventional due process standards.

LIST OF PARTIES

All of the parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the Petition and is unpublished (App. A 1-7).

The opinions of the United States District Court for the District of Connecticut appear at Appendix B to the Petition (App. B 8-19).

JURISDICTION

The date on which the United States Court of Appeals decided our case was October 31, 1996.

No Petition for rehearing was filed in our case.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND SATUTORY PROVISIONS INVOLVED

26 U.S.C.. Section 6511(b)

STATEMENT OF THE CASE

The reoccurring issue to be decided in this case is whether or not a taxpayer's remittance with a Form 4868 Automatic Extension Request to the Internal Revenue Service (IRS) was a payment which was forfeited or a

deposit which could be allocated to plaintiffs' taxes or refunded if overpaid. Plaintiffs are informed that about 20 to 30 cases are known to be awaiting determination of the same issues and is a common recurring problem to American taxpayers.

This case was commenced by Complaint with Plaintiffs' Demand for a Jury Trial. A Jury was selected on June 15, 1995 with trial to begin on July 11, 1995. Request to Charge was prepared and Jury Interrogatories were also prepared requesting the jury to make specific findings as to whether the remittance was either: 1. Solely a payment; 2. Solely a deposit; or, 3. Whether it was a combination of payment and deposit - obviously a factual question.

The plaintiffs appeared for a Jury Trial on July 11, 1995. The lower Court Judge advised the parties that he had decided to treat the case as a matter of law and indicated that he had dismissed the jurors. The plaintiffs were not allowed to present testimony.

Assurances were given by IRS Collection Agents that when a duplicate 1986 (signed) return was filed, defendant's levy for 1988 overdue taxes would be invalid and withdrawn. To facilitate this agreement, a signed duplicate return was hand delivered in August of 1992.

Instead of a jury trial, the Court allowed oral argument on the law of the case with the stated intention to rule as a matter of law since the Court did not see any relevant factual issues.

REASONS FOR GRANTING THE WRIT

I. CONFLICTING DECISIONS ARE PROLIFERATING RAPIDLY IN THE DISTRICT COURT LEVEL AND IN PARTICULAR AT THE COURT OF APPEALS LEVEL OF THE DIFFERENT CIRCUITS.

I. The need for guidance from this Court is necessary to resolve these conflicts.

In J. Lynn Harden and Madelyn R. Harden v. United States of America, an Appeal from the United States District Court for the Eastern District of Texas, Chief Judge Plitz in wring the opinion for the Court granted Summary Judgment in favor of taxpayers that such a payment was a deposit, as a matter of law not subject to forfeiture until a return was filed.

In the instant case, the United States Court of Appeals for the Second Circuit decided that such a payment as a matter of law may be forfeited without the filing of a return and, in addition, decided on a factual basis that the payment could not be termed a deposit. This factual finding without the benefit of any trial in any of the lower courts was made as a matter of law.

In the cases cited in the written opinion of the Court below, it was decided as a matter of law that a remittance with Form 4868 was a tax payment subject to forfeiture to the applicable statutes of limitation.

In addition, a Tax Court case (see Risman cited below) holds that a determination of whether or not such a remittance is a tax payment or a deposit is a question to be determined on a case by case basis depending on the particular facts and reasons for sending in the payment.

It is obvious that the above cases are in conflict as to the law in each of said jurisdictions.

II. The decision of the Court of Appeals is erroneous.

The better reasoning in imposing a rule of law as it would pertain to the instant case and other similar cases as contained in the Crosby case written by Judge Billings in Vermont and the Risman case, the essence of such reasoning underscores the fact that notice of forfeiture will necessarily be supplied to any taxpayer prior to the fact and not after the fact as happened in the instant case. This Court should take judicial notice of the fact that lower federal and district courts are now encouraged to determine matters as a matter of law and eliminate all findings other than substantial questions of fact. This new court attitude has a chilling effect on a citizen's right to a jury trial and underscores the unfairness which taxpayers could readily perceive.

III. The question presented is important.

Fairness in the tax system is paramount if it is to have the respect of taxpaying citizens. The identical question has come up in many unreported and/or unpublished decisions and in at least 20 or 30 cases known to be at issue I other cases now pending. Uniformity and fairness are critical to our justice system.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: March 27, 1997

Respectfully submitted,

Theresa Marie Pantani
Edmund L. Pantani
Date: January 27, 1997
Resubmitted:

No. _____

In The

Supreme Court Of The United States

October Term, 1996

TERESA MARIE PANTANI and
EDMUND L. PANTANI

Petitoners

v.

SHIRLEY D. PETERSON, Commissioner of the IRS
and UNITED STATES OF AMERICA

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 31st day of October, one thousand one hundred and ninety-six.

Present: HONORABLE JAMES L. OAKES,

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,

HONORABLE RALPH K. WINTER <

Circuit Judges.

- -

TERESA MARIE PANTANI and EDMUND L. PANTANI,

Plaintiff-s Appellants,

-v- No. 96-6018

SHIRLEY D. PETERSON, Commissioner of IRS and UNITED STATES OF AMERICA,

Defendants- Appellees.

- -

Appearing for Appellants: Max F. Brunswick, New Haven, Ct.

Appearing for Appellees: Gary R. Allen, Tax Division, United States Department of Justice, Washington, D.C.

ISSUED AS MANDATE 12-24-96

Appeal from the United States District Court for the District of Connecticut (Dorsey, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby affirmed.

Teresa Marie Pantani and Edmund L. Pantani appeal from Judge Dorsey's grant of Rule 11 sanctions and a grant of summary judgment to appellees (the "government").

It is not wholly clear whether the Pantanis' challenge on appeal the imposition of Rule 11 sanctions. If they do, we do not hesitate to find no abuse of discretion in the district court's award. See Virginia Atlantic Airways v. National Mediation Bd., 956 F.2d 1245, 1254 (2d Cir.), cert. Denied, 506 U.S. 820 (1992) (applying abuse of discretion standard to appellate review of Rule 11 sanctions) (citing Cooter & Gell v. Harmarx

Corp., 496 U.S. 384 (1990)). The Pantanis attorney, admitted receiving a copy of the government's Rule 11 motion, but claims that he believed that Mr. Pantani, also an attorney, would respond. The district court was correct in concluding that this assumption did not relieve him of his obligation to respond and that plaintiffs were properly served. See Fed. R. Civ. P. 5; Pantani v. Peterson, 902 F. Supp. 24 (D. Conn. 1995).

On their appeal from the grant of summary judgment, the Pantanis argue that their remittance of $86,000 in 1987, sent along with their Form 4868 request for extension of time to file a return for 1986, was a deposit rather than a payment of tax. As a deposit, the remittance would not be subject to the statute of limitations of 26 U.S.C. Sec. 6511(b)(2)(A). Their argument is meritless.

First, the Internal Revenue Code requires that the Pantanis' remittance be treated as a payment of estimated tax. Section 6513(b)(2) provides that "[a]ny amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return)." 26 U.S.C. Sec 6513(b)(2). Other circuits have been faced with the issue of how to decide whether remittances sent in with a Form 4868 extension request are deposits or payments and have held that they are payments as a matter of law. See Gableman v. Comm'r of Internal Revenue, 86 F.3d 609, 611-613 (6th Cir. 1996); Weigand v. United States, 760 F.2d 1072, 1073-74 (10th Cir. 1985); see also Zeier v. United States Internal Revenue Serv., 80 F.3d 1360, 1363-64 (9th Cir. 1996); Blatt v. United States, 34 F.3d 252, 254 (4th Cir.

1994). But see Risman v. Comm'r of Internal Revenue, 100 T.C 191, 198 (1993).

Second, by Mr. Pantani's own admission during a deposition, the remittance constituted a payment. During the deposition the following exchange occurred:

> Q. In [Government Exhibit 1] or in the affidavit you talk about you mailing in a check for $86,000 to the Internal Revenue Service.
>
> When you mailed in this check did you anticipate that you would have an income tax liability for 1986?
>
> A. Yes.
>
> Q . And your intent on mailing this check was to pay the income tax liability?
>
> A. To send in a payment to avoid any penalties and put something forward to preserve all the rights and obligations that go with paying your taxes and filing your returns.
>
> It was probably more money than was going to be due, but I was advised to send in more because it was hard to figure out the exact amount that year.
>
> Q. Did you intend for this money to be applied toward your 1986 income tax liability?
>
> A. Some of it.
>
> Q. And did you believe you had an income tax liability for 1986?

A. I was advised that I would have a liability for that year, yes.

Q. Did you personally believe you had one?

A. Yes, I thought it was going to be closer to around $40,000. The accountant said it could be as high as $86,000 and to send in that amount as a good-faith payment. I had to take out a loan to do it. I found the loan papers to this this morning.

What Mr. Pantani describes is a payment of estimated tax, not a deposit. Cf. Zeier, 80 F.3d at 1364. As a payment of estimated tax, it is subject to the limitations period of 26 U.S.C. Sec. 6511(b)(2)(A).

We therefore affirm.

/s/ James L. Oakes
Hon. James L. Oakes, U.S.C.J.

/s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland, U.S.C.J.

/s/ Ralph K. Winter
Hon. Ralph K. Winter, U.S.C.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TERESA MARIE PANTANI,
ET AL. :

-vs- : Docket No.
3:94CV1207(PCD)

SHIRLEY D. PETERSON :
COMMISSIONER INTERNAL
REVENUE SERVICE :

MEMORANDUM OF DECISION

A. Motion for Sanctions

Defendant's motion for sanctions was granted. Plaintiffs subsequently claimed that Mr. Pantani, an attorney, received no copy of the motion. He entered an appearance for himself and his co-plaintiff as did Mr. Brunswick. Mr. Brunswick concedes getting a copy of the motion. His assumption that Mr. Pantani would take care of the matter does not discharge his obligation nor does it preclude the court from holding him to doing so. Plaintiffs were properly served notwithstanding Mr. Pantani's assertion.

The governments' claims on which the motion was premises are uncontradicted. Therefor the grant of the motion will stand. Based on the government's unchallenged submission, plaintiffs shall pay to defendant the sum of $914.00.

B. Motion for Summary Judgment

Plaintiffs claimed 1) a refund or credit for an overpayment for the year 1986 and 2) a refund or credit for an overpayment of taxes for the year 1989. These claims are interrelated because claim 2) is based on entitlement to credit for the overpayment in claim 1). The IRS disputes plaintiffs' entitlement to any credit or refund of the 1986 overpayment because there was no claim therefor within the time allowed. Plaintiffs claimed that the tax for 1988, $23,016, was paid by crediting the 1986 overpayment. The IRS disallowed such a credit. It concedes a $29,000 1989 overpayment but allocated $23,106 thereof to pay the 1988 tax.

Summary Judgment entered for the government on these claims absent objection. The government concedes plaintiffs' entitlement to $5,984. Plaintiffs' motion for reconsideration was denied (on May 17, 1995) as the failure to interpose any opposition was not excused. It was further relevant that the grant of sanctions, on April 21, 1995, was based on plaintiffs' assertion of false facts in the complaint in that the form on which the 1986 return was filed, allegedly in August, 1987, did not exist on that date. This was material to the claim of entitlement to credit for the 198 overpayment since the IRS has no record of the filing of the 1986 return, on which the claim for refund of the overpayment was based, until August 8, 1992. Treated as a refund claim, as then filed it was too late and was denied.

Plaintiffs cannot claim, that the 1986 return was filed earlier than 1992. Mr. Pantani first claimed that it was filed in August 1987. Without equivocation or

reservation, under oath, he stated as the truth that the return was filed in August, 1987. Ex. B Confronted with the impossibility of filing in August, 1987, a return that included a form not printed by the IRS until November 1987, he offered a new explanation, that he relied on others for his information and he recalled the date of filing as after November 1987. Correcting Affidavit dated June 1, 1995. That contention cannot be credited because the return is dated August 14, 1987 when the Computation of Investment Credit Form, Ex. C, did not exist. Necessarily the return was backdated. Plaintiffs have neither conceded that fact nor shown any valid filing date other than the IRS record date of August 21, 1992.

The parties agreed that the facts were not in dispute and the matter should be resolved of the basis of cross motions for judgment as matter of law. Defendant concedes plaintiffs are entitled to $5,984, the $29,000 1989 overpayment less the $23,016 applied to the 1988 tax due.

In the 1989 return, Ex. F*, an investment credit of $14,415 was claimed, Ex. F., P.2, 1. 46, part of which, $11,046, was based on an $84,966 rehabilitation expenditure on property at 47 E. Main Street, Ex. F, p. 11 (Form 3486). Such a credit is authorized if made with respect to property used more than 50% in a trade or business. In the same return plaintiffs reported the $84,966 as expended on property used 50% or less in a

---

*Exhibits are identified as attached to defendant's motion for Summary Judgment dated June 15, 1995.

trade or business. Ex. F, p. 14 (Form 4562). No evidence in contradiction of this assertion was offered. The $11,046 credit in the 1989 return was thus properly denied by the IRS. The recomputation of the 1989 tax resulted in a tax due as opposed to plaintiffs' claim of entitlement to a tax refund for the tax year 1989.

Plaintiffs claim the remainder of the 1986 overpayment. Conceding that no claim was filed until 1992, "[w]hile it may appear that the plaintiffs did not file their claim for credit within two years of the 1986 payment," Plaintiffs' Memorandum dated June 23, 1985, they argue they are not barred because the $86,000 was not a payment of taxes. This reargues the granted government motion for summary judgment. It asserts opposition to the motion not previously filed, which failure was not excused as discussed above in relation to the failure to file, on time, an opposition to the motion for sanctions. Plaintiffs cannot resuscitate a claim decided by the entry of summary judgment.

Plaintiffs may not rely on equitable recoupment. They are in no different position than was claimant in United States v. Dalm, 494 U.S. 596 (1990) who sought to "invoke equitable recoupment only in a separate action for refund of . . . tax, an action for which there is no statutory authorization by reason of the bar of the limitation statute." Id. At 609.

Nor may the 1987 return constitute a valid claim because it was filed February 20, 1990 more than two years after the payment date, April 15, 1987. 26 U.S.C. Sec. 6511(a).

As their remaining claim after the granting of the motion for summary judgment, for $5,984, is not disputed

as an overpayment, summary judgment for the taxpayers in that amount will enter.

Conclusion

Judgment shall enter on Count Two for plaintiffs in the amount of $5,984.

SO ORDERED.

Dated at New Haven, Connecticut, August 17, 1995.

/s/ Peter C. Dorsey
Peter C. Dorsey
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THERESA MAIRE PANTANI and	)	
EDMUND L. PANTANI	)	
	)	
V.	)	CASE NO.
	)	3:94CV01207(PCD)
SHIRLEY D. PETERSON	)	
COMMISSIONER, INTERNAL	)	
REVENUE SERVICE	)	

JUDGMENT

This cause having come on for consideration of cross-motions for judgment before the Honorable Peter C. Dorsey, Chief United States District Judge, and the issues having been duly considered including applicable principles of law and on August 17, 1995, a Ruling having been filed granting plaintiffs' motion on Count Two of the Complaint.

It is ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of the plaintiffs' to recover of the defendant the sum of $5,984.00 on Count Two of the Complaint.

Dated at New Haven, Connecticut, this 23rd day of August, 1995.

KEVIN F. ROWE

CLERK, UNITED STATES DISTRICT COURT

BY /s/ FRANCES CONSIGLIO
DEPUTY IN CHARGE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

TERESA MAIRE PANTANI and EDMUND PANTANI	)
	)
	)
v.	)CASE NO.
	)3:94CV01207(PCD)
COMMISSIONER OF INTERNAL REVENUE	)
	)

AMENDED JUDGMENT

This cause having come on for consideration of cross-motions to alter or amend judgment before the Honorable Peter C. Dorsey, Chief United States District Judge, and the issues having been duly considered and on November 29, 2995, a Ruling having been filed denying plaintiffs' motion and granting defendant's motion,

It is ORDERED, ADJUDGED and DECREED that the judgment entered on August 23, 2995, be and is hereby vacated and judgment be and is hereby entered in favor of the defendant on Counts I and II of the complaint (summary judgment having been granted in favor of the defendant on February 16, 1995).

Dated at New Haven, Connecticut, this 30th day of November, 1995.

KEVIN F. ROWE
CLERK, UNITED STATES DISTRICT COURT

BY /s/ FRANCES CONSIGLIO
DEPUTY IN CHARGE

Supreme Court, U.S.
FILED
MAY 30 1997
CLERK

No. 96-1574

In the Supreme Court of the United States

OCTOBER TERM, 1996

TERESA MARIE PANTANI AND EDMUND L. PANTANI,
PETITIONERS

v.

MARGARET MILNER RICHARDSON,
COMMISSIONER OF THE IRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a remittance made by petitioners in connection with a request for an extension of time to file their income tax return was a payment of tax that commenced the running of the statute of limtations for a subsequent refund claim seeking recovery of that payment.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1574

TERESA MARIE PANTANI AND EDMUND L. PANTANI,
PETITIONERS

v.

MARGARET MILNER RICHARDSON,
COMMISSIONER OF THE IRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unpublished, but the decision is noted at 104 F.3d 352 (Table). The opinion of the district court (Pet. App. B6-B10) is reported at 902 F. Supp. 24.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1996. The petition for a writ of certiorari was filed on January 29, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6151(a) of the Internal Revenue Code, 26 U.S.C. 6151(a), provides:

> **General rule.**—Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

2. Section 6511(b) of the Internal Revenue Code, 26 U.S.C. 6511(b), provides, in relevant part:

> **Limitations on allowance of credits and refunds**
>
> **(1) Filing of claim within prescribed period**
>
> No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.
>
> **(2) Limit on amount of credit or refund**
>
> **(A) Limit where claim filed within 3-year period**
>
> If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid

within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) Limit where claim not filed within 3-year period

If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) Limit if no claim filed

If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

* * * * *

3. Section 6513(b) of the Internal Revenue Code, 26 U.S.C. 6513(b), provides in relevant part:

Prepaid income tax For purposes of section 6511 or 6512—

* * * * *

(2) Any amount paid as estimated income tax for any taxable year shall be deemed to have

been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

* * * * *

STATEMENT

1. On April 15, 1987, petitioners remitted the sum of $86,000 to the Internal Revenue Service. This amount represented their estimated liability for income taxes for 1986. The remittance accompanied petitioners' application for a four-month extension of time for the filing of their 1986 tax return (Pet. App. A3). Although the requested four-month extension was granted, petitioners did not actually file their 1986 tax return until more than five years later, in August 1992 (*id.* at B7-B8). The return that they ultimately filed for 1986 showed a tax liability of $54,476 and claimed an overpayment of $33,571.

Petitioners sought to have the amount of the overpayment claimed on their belated 1986 tax return credited against their tax liability for 1987. The Service denied that request because the 1986 taxes had been paid more than three years before the refund claim was made and recovery was therefore barred by the express terms of 26 U.S.C. 6511(b)(2)(A).

2. Petitioners then commenced this tax refund suit in federal district court. They asserted that their refund claim was not untimely because the $86,000 remittance that they made in April 1987—in connection with their request for a four-month extension of time to file their 1986 return—was a "deposit" rather than a "payment" (Pet. App. B9; see also *id.* at A3). Based on the theory that the 1987 payment was

only a "deposit," petitioners claimed that the statute of limitations on refund claims in 26 U.S.C. 6511(b)(2)(A) did not bar recovery in this case.

The United States moved for summary judgment, and petitioners failed to make any timely response. The district court granted summary judgment for the government "absent objection" by petitioners (Pet. App. B7). The court thereafter refused petitioners' request for reconsideration. The court noted that petitioners had offered no valid reason for not responding to the summary judgment motion and that their "failure to interpose any opposition was not excused" (*ibid.*).

The district court also awarded sanctions against petitioners because of the "false facts" that they had asserted in the complaint (Pet. App. B7). Petitioners had alleged in the complaint that their refund claim was timely because their return had been filed in August 1987, within the period of the four-month extension of time obtained in April 1987. The district court explained, however, that the tax return forms that petitioners claimed to have filed in August 1987 did not even exist at that time and that it was therefore clear that the return offered by petitioners had been "backdated" by them (*id.* at B8). The district court awarded sanctions against petitioners under Rule 11 of the Federal Rules of Civil Procedure for their dishonest use of a fraudulent exhibit that improperly purported to show a timely filing (*id.* at B7-B8).

3. The court of appeals affirmed (Pet. App. A1-A5). The court first stated that it was not clear whether petitioners sought to challenge the Rule 11 sanctions entered by the district court but that, "[i]f they do, we do not hesitate to find no abuse of discretion in the

district court's award" (*id.* at A2). The court also affirmed the judgment in favor of the United States on the merits of the refund claim.[1]

The court stated that the contention that the remittance of $86,000 made by petiitoners was a "deposit" rather than a "payment" was "meritless" (Pet. App. A3). The court noted that 26 U.S.C. 6513(b)(2) expressly provides that any remittance submitted "as estimated income tax" is to be "deemed to have been paid on the last day prescribed for filing the return * * * (determined without regard to any extension of time * * *)." The court agreed with the several other appellate courts that have held that a remittance submitted "as estimated income tax" is therefore a "payment" of tax, not a "deposit," as a matter of law. Pet. App. A3, citing, *e.g.*, *Gabelman* v. *Commissioner*, 86 F.3d 609, 611-613 (6th Cir. 1996); *Weigand* v. *United States*, 760 F.2d 1072, 1073-1074 (10th Cir. 1985).

The court further ruled that, even if the question whether the remittance was a "payment" or a "deposit" should be determined as a question of fact, rather than as one of law, petitioner's admissions during discovery required the conclusion that the remittance was intended as a "payment." Because—both as a matter of fact and as a matter of law—the remittance was a "payment" and not a "deposit," the court held that its recovery is barred by the statute of

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[1] The government did not urge the court of appeals to affirm the award of summary judgment on the ground that petitioners had waived their right to oppose the summary judgment motion. The court of appeals therefore addressed the merits of the underlying tax issue and affirmed on that basis (Pet. App. A2-A5).

limitations contained in 26 U.S.C. 6511(b)(2) (Pet. App. A5).

ARGUMENT

The court of appeals correctly concluded that the remittance of estimated taxes submitted by petitioners in April 1987 was a "payment" of taxes and that their belated request for a refund was untimely. Although various circuits have applied different tests for determining whether a "payment" or "deposit" has been made, and although that issue may in a future case merit this Court's review, the present case does not provide an appropriate vehicle for resolving these disparate analyses.

1. The courts of appeals have not applied a uniform analysis in determining whether a remittance of an estimated tax liability is a "payment" of tax or a "deposit." Some circuits have concluded, as the court did in this case, that a remittance of an estimated tax is a "payment" of tax as a matter of law. See Pet. App. A3 (citing cases). Other circuits have concluded that, in determining whether a remittance is a deposit or a payment, the appropriate inquiry in every case should focus on the facts and circumstances under which the remittance was made. See, *e.g.*, *Zeier* v. *IRS*, 80 F.3d 1360 (9th Cir. 1996); *Moran* v. *United States*, 63 F.3d 663, 667-668 (7th Cir. 1995); *Ewing* v. *United States*, 914 F.2d 499, 502-503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991); *Ameel* v. *United States*, 426 F.2d 1270, 1273 (6th Cir. 1970); *Fortugno* v. *Commissioner*, 353 F.2d 429 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966); *Cohen* v. *United States*, 995 F.2d 205 (Fed. Cir. 1993). That inquiry typically seeks to determine the taxpayer's "intent" in making the remittance.

The difference in the methods of analysis applied by these circuits is not, however, material to the disposition of the present case. In the courts below, petitioners asserted that, viewing the facts in their entirety, their 1987 remittance of estimated taxes for 1986 should be treated as a "deposit" rather than as a "payment." As the court of appeals observed, however, even if this issue were treated as a question of fact—rather than as one of law—the remittance made in this case "constituted a payment" based upon "Mr. Pantani's own admission during a deposition" (Pet. App. A4). The court noted that Mr. Pantani acknowledged that his intent in submitting the remittance was "[t]o send in a payment" that would "be applied toward [his] 1986 income tax liability" (*ibid.*). As the court noted, "[w]hat Mr. Pantani describes is a payment of estimated tax, not a deposit" (*id.* at A5). That factual conclusion is amply supported by the record (*id.* at A4-A5), and any dispute about its correctness does not present a question warranting this Court's review.

Whether the status of the remittance of estimated taxes as a "payment" or as a "deposit" is to be determined as a matter of law or as a matter of fact under the standards discussed above, the same conclusion would be reached in this case. The present case therefore does not provide an appropriate vehicle for resolving the different methods of analyses applied by these circuits on this issue. See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

2. The Fifth Circuit has applied a different test in determining whether a remittance is a "payment" or a "deposit." Under the standard applied in that circuit, any remittance made before the underlying tax liability is assessed is treated as a "deposit," rather

than as a "payment," as a matter of law. See, *e.g.*, *Harden* v. *United States*, 76 A.F.T.R. 2d (P-H) 95-7980 (5th Cir. Nov. 30, 1995 (No. 95-40046)); *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980); *Thomas* v. *Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953).

In neither of the courts below, however, did petitioners cite or rely upon the Fifth Circuit precedent or the rule applied in that circuit. In particular, petitioners did not claim that their remittance was a "deposit" as a matter of law because it was made before the tax was assessed. Instead, petitioners argued only that their remittance was a "deposit" as a matter of fact because their intent was not to make a payment (Pet. App. A3-A4). The argument that petitioners now seek to raise in their petition by citing *Harden* for the first time (Pet. 3) was not raised or addressed below. This case thus does not present a suitable occasion for review of the singular rule adopted and applied in the Fifth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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